IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 14-08-2008

CORAM

THE HONOURABLE MR.JUSTICE S.J.MUKHOPADHAYA

AND

THE HONOURABLE MR.JUSTICE V.DHANAPALAN

WRIT APPEAL No.943 OF 2007

The Management of Karur Vysya Bank Limited,
rep.by its Chairman,
Central Office,
Karur-639 002. ... Appellant

-vs-

1.The Presiding Officer,
Industrial Tribunal,
Madras.

2.S.Balakrishnan. ... Respondents

Appeal under Clause 15 of the Letters Patent.

For appellant : Mr.A.L.Somayaji,
Senior Advocate,
for M/s.T.S.Gopalan & Co.

For respondent 2 : Mr.D.Hari Paranthaman

J U D G M E N T

V.DHANAPALAN,J.

Management-Bank has filed this appeal against the order, dated 29.01.2007, passed in W.P.No.17623 of 1997, wherein the order passed by the first respondent, reinstating the second respondent-workman, was confirmed by a learned single Judge.

2. Second respondent was appointed as a Clerk in the appellant bank on 26.02.1980 and, lastly, he worked with the Pandamangalam Branch. While so, on 16.08.1988, the second respondent had taken the cash of Rs.11,000/- from the bank without the sanction of the Branch Manager and given the same to his brother-in-law, who had come there, for redeeming the jewel, which was pledged with

some other bank. The Bank Manager complained the matter to Central Office and the matter was investigated into. On 31.08.1988, a charge memo was issued to the second respondent, setting out allegations and calling upon him to submit an explanation, pursuant to which an enquiry was held. On 23.11.1989, the Enquiry Officer gave his report, holding that the charges against the second respondent were proved. Thereafter, the second respondent was asked to appear for a personal hearing to show cause against the proposed punishment of dismissal and, after hearing the representation of the second respondent, orders were passed on 06.01.1990, dismissing the second respondent from service.

3. As I.D.No.58 of 1989 on the question of bunus for the year 1981-1982 was pending before the first respondent and no approval application was filed by the appellant before passing the order of dismissal, the second respondent preferred a complaint under Section 33-A of the Industrial Disputes Act and the same was numbered as Complaint No.6 of 1991. The nature of the complaint was that the appellant had not complied with the mandatory provision of Section 33 (2) (b) for getting approval from the Tribunal and, therefore, the order of dismissal was non-est in law.

4. The stand of the appellant before the Tribunal was that the violation of Section 33 would not vitiate the order of dismissal.

5. The first respondent-Tribunal, by an award, dated 26.03.1997, set aside the order of dismissal passed against the second respondent, directing reinstatement with continuity of service and full back wages and also other attendant benefits. Challenging the said award, the Management filed Writ Petition No.17623 of 1997 and the same was dismissed by the learned single Judge, confirming the award passed by the first respondent. Hence, this appeal, at the instance of the Management.

6. Mr.A.L.Somayaji, learned Senior Counsel for the appellant would contend that the second respondent cannot invoke the writ jurisdiction against the order passed under Section 33-A for the alleged violation of Section 33; as the second respondent had invited the first respondent to adjudicate his complaint as if it is an industrial dispute challenging the order of dismissal, it is not open for the learned single Judge to sustain the award of the first respondent by reference to violation of Section 33 and had the second respondent merely rested his case challenging the order of dismissal on the ground of violation of Section 33 at the earliest point of time when the complaint was filed, the appellant would have had the opportunity of curing the defect by filing an application for approval or rescinding the order of termination and substituting by a fresh order of termination. It is also his contention that the scheme under provisions of Sections 33 and 33-A of the Act is to provide an opportunity to the aggrieved workman to get the order of termination adjudicated either as an application for approval or as a dispute and in the instant case the employee, having availed the benefit of adjudication of dismissal on merits, forfeited his right to challenge the order of dismissal on the ground of violation of Section 33. The bottomline of the learned Senior Counsel is that the second respondent, having failed to raise the plea of dismissal order being null and void for violation of Section 33 (2) (b) of the Industrial Disputes Act, cannot be allowed to raise such a ground for the first time in the Writ Petition and, therefore, the order impugned is erroneous and the same is liable to be set aside. In support of his argument, the learned Senior Counsel has relied on the following decisions :

(i) Indian Bank v. R.S.Thiruvengadam and Another, 1990 (2) LLN 26 :
"5. If the plea of want of jurisdiction in the second respondent on the ground that the Shop Act does not apply to the appellant-bank had been taken at the earliest point of time, i.e., when the appeal was filed before the second respondent in the year 1974, and the plea had been rejected on the basis of any prevailing judgments of the High Courts or the Supreme Court, then it would have been a different matter. The appellant may then have a cause of action to say that the Courts have taken a

different view subsequently and, therefore, he is pressing the plea of jurisdiction. If the appellants had themselves assumed that even a nationalised bank will come within the purview of the Shop Act, then, they have to suffer the consequences. This is because, if the plea of want of jurisdiction had been raised before the second respondent, it may be that the first respondent might have realised the force of the contention and resorted to alternative remedies. To this extent, the first respondent has definitely been prejudiced. After nearly 17 years and after the first respondent had succeeded before the second respondent as well as before a learned single Judge of this Court, without the question of jurisdiction having been debated, it would be most improper and inequitable on the part of this Court to tell the first respondent that he has to challenge the order of discharge, dated 22 November 1973, in some other forum. In other words, to set the clock backwards and go back to the date, viz., 22 November 1973, the date of discharge of the first respondent from service and push the first respondent back to square one does not appear to be fair and at any rate it does not amount to advancing the cause of justice. "

(ii) United Bank of India v. Sidhartha Chakraborty, 2007 (III) LLJ 782 :
"12. Considering the peculiar facts of the case and the background in which the disciplinary action was taken against the respondent, and the position in law as stood at the relevant time the order of dismissal was passed, the quantum of back wages is restricted to Rupees Two lakhs to be paid within a period of four weeks from today. If any amount has already been paid, the same shall be deducted from the amount directed to be paid."

7. We have heard the learned counsel for the second respondent on the above aspects, who, in support of his case, has cited the following decisions :
(i) Indian Telephone Industries Ltd. and Another v. Prabhakar H.Manjuare and Another, 2003 (1) SCC 320 :

"5. A Constitution Bench of this Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. has ruled that the conditions contained in the proviso to Section 33(2)(b) are mandatory in nature and their non-compliance would render the order of discharge or dismissal void or inoperative. It is further held that if the Tribunal refuses to grant the approval sought for under Section 32(2)(b), the effect of it shall be that the order of discharge or dismissal had never been passed and consequently the employee would be deemed to have continued in service entitling him to all the benefits available. It is also made clear that not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). "

(ii) Rajinder Singh v. Delhi Transport Corporation and others, 2003 (3) LLN 573 :

"5. ... while the employer has the discretion to initiate departmental inquiry and pass an order of dismissal or discharge against the workman the order remains in an inchoate state till the employer obtains orders of approval from the Tribunal. By passing the order of discharge or dismissal de facto relationship of employer and employee may be ended but not the de jure relationship for that could happen only when the Tribunal accords its approval. ... In a instant case where the Tribunal refuses to accord approval to the action taken by the employer and rejects the petition filed under S.33(2)(b) of the Act on merit the employer is bound to treat the employee as continuing in service and give him al the consequential benefits."

(iii) Management of Sri Ganapathy Mills Company Ltd. Tirunelveli v. Presiding Officer, Special Industrial Tribunal, Madras and Another, 2003(3) L.L.N. 355 :

"4. ... The petitioner/management, by omission, did not seek approval of the action under S.33(2)(b) of the Industrial Disputes Act to dismiss the second respondent/workman from service. Therefore, the second respondent/workman filed a complaint under S.33A of the Act..... However, the first respondent Industrial Tribunal held that inasmuch as the domestic enquiry was held to be invalid, but subsequently, the Tribunal upheld the punishment, the second respondent would be entitled to wages from the date of dismissal, namely, 31 January 1993, till the date of award, namely, 8 November 1995. Aggrieved by the declining of the relief of reinstatement with back-wages and other benefits, the second respondent/workman has challenged the award in W.P.No.145 of 1997 and aggrieved by the granting of relief of wages from 31 January 1993 to the date of award, the petitioner/management has challenged the award in W.P.No.11436 of 1996.

8. The law is well settled that "non-compliance of the condition contained in the proviso to S.33(2)(b), which is mandatory in nature, would render the order of dismissal void and the effect of which shall be that the order of dismissal had never been passed and the employee would be deemed to have continued in service. In the present case, admittedly, the petitioner/management did not comply with the condition under S.33(2)(b) while rendering the order of the dismissal of the second respondent/workman and hence it shall be that the order of the dismissal has never been passed and the second respondent/workman will be deemed to have been in service and entitled to all the benefits available to him. ..."

(iv) C.Ramanujam v. Presiding Officer and Another, 2003 (4) LLN 117 :

"4. An employer who does not make an application under S.33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting security of the authority in the matter of granting approval of the action taken by him. ...

5. Therefore the law as declared by the Supreme Court as on date, is that there can be no valid order of dismissal for discharging an employee from service if there was no approval as required under S.33(2)(b) of the Industrial Disputes Act, 1947.

7. In Baburam vs. C.C.Jacob and other (1999 (3) LLN 26), the Supreme Court observed that the purpose of prospective declaration is to avoid reopening of settled issues and to prevent multiplicity of proceedings. Therefore in the absence of a specific declaration to give effect to the judgment only prospectively, the judgment is bound to apply to pending cases also. ..."

(v) Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma and others, 2002 (2) SCC 244 :

"12. ... The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate proceeding taken by the employee under Section 33-A or in a reference under direct payment of wages to the first respondent on the basis as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33-C(2). ...

13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further, any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000 or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in another way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless.....The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

14. ... If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if the order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of the employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available.....

15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit as such an order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted.... An employer who does not make an application under Section 33(2) (b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application."

(vi) An unreported decision of this Court in K.Ramakrishnan and Others v. The Presiding Officer and another, passed in W.P.No.15585 of 2004 :

"3.... At that juncture, the instant application was filed before the Tribunal by the employees stating that the matter need not be gone into on the factual position, but simply on the question of law, and hence, dismissal of the employees from service has got to be declared invalid, since it is violative of the mandatory provisions enshrined in Sec.33(2)(b) of the Industrial Disputes Act. The said application was dismissed by the Tribunal. On the dismissal of the same, the employees have brought forth this writ petition.

9.... no workman shall be discharged or dismissed unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is

pending for approval of the action taken by the employer. Further, the proviso would read that the employer, before passing the order of dismissal or discharge, should obtain the prior approval of the authority for the action taken, and further, once it is found to be mandatory provision and if not followed strictly, there cannot be any hesitation for the Court to declare it invalid or void. The law is well settled that non-compliance of the mandatory provisions contained in the proviso to Sec. 33(2)(b) would render the order of dismissal void and the effect of which shall be that the order of dismissal had never been passed and the employee would be deemed to have continued in service.

10... In view of the non-compliance of the said mandatory provisions, it can be stated that the order of dismissal has never been passed, and the petitioners would be deemed to have been in service and entitled to all the benefits available to them. Therefore, following the decisions of the Apex Court as well as this Court referred to above, this Court is of the considered opinion that it is a fit case where the writ what is asked for by the petitioner to quash the order of the Industrial Tribunal, has got to be given. "

8. We have considered the rival submissions made by the learned counsel on either side and the decisions cited by them and also gone through the records.
9. It is not in dispute that the second respondent was employed in the appellant Bank and, for the alleged misbehaviour, a charge memo was served, calling upon him to submit an explanation and the same was also submitted. Subsequently, an enquiry was held and the Enquiry Officer submitted his report, holding the second respondent guilty of the charges and, thereafter, the second respondent was dismissed from service on 06.01.1990. It is also not debated that I.D.No.58 of 1989 on the question of bonus for the year 1981-1982, to which the second respondent was one of the parties, was pending before the first respondent and no approval application was filed by the appellant before the Tribunal, prior to passing the order of dismissal against the second respondent.

10. When the employer initiates a departmental inquiry and passes an order of dismissal or discharge against the workman, that order remains in an inchoate state until the employer obtains an order of approval by filing an application under Section 33 (2) (b) before the Tribunal, where the proceedings are pending. By passing the order of discharge or dismissal, the de facto relationship of employer and employee may be ended but not the de jure relationship, which could happen only when the Tribunal accords its approval.
11. The conditions contained in the proviso to Section 33 (2) (b) are mandatory in nature and their non-compliance would render the order of dismissal void.

12. In the present case, admittedly, the appellant/management did not comply with the condition under Section 33 (2) (b) before passing the order of dismissal of the second respondent/workman and, hence, the effect of it shall be that the order of dismissal has never been passed and the second respondent/workman will be deemed to have been in service and is entitled to all the benefits available to him. In other words, not making an application seeking approval before any order is made is a clear case of contravention of the proviso to Section 33 (2) (b). If the Tribunal refuses to grant the approval sought for under Section 33 (2) (b), the outcome of it shall be that the order of discharge or dismissal has never been passed and, consequently, the employee will be deemed to have continued in service entitling him to all the benefits available. In this case, as the appellant did not seek approval of the action under S.33 (2) (b) to dismiss the second respondent from service, the second respondent filed a complaint under Section 33-A of the Act and the same was rightly entertained by the Tribunal.

13. An employer, who does not make an application under Section 33 (2) (b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys

the command of law and makes an application inviting security of the authority in the matter of granting approval of the action taken by him. Therefore, the law, as declared by the Supreme Court, is that there can be no valid order of dismissal for discharging an employee from service if there is no approval as required under S.33 (2) (b) of the Industrial Disputes Act, 1947.
14. In paragraph 7 of the complaint, the second respondent had clearly stated that before passing the order of dismissal, the opposite party, namely, the appellant had not complied with the mandatory provisions of Section 33 (2) (b) of the Industrial Disputes Act and they have also not sought the approval of the Hon'ble Tribunal for the punishment given to the second respondent and thus the appellant has contravened Section 33 of the Act. In view of the said statement made in the complaint, the contention of the learned Senior Counsel for the appellant that the second respondent, having failed to raise the plea of dismissal order being null and void for violation of Section 33 (2) (b) of the Industrial Disputes Act, cannot be allowed to raise such a ground for the first time in the Writ Petition is rejected.

15. In the case of Union Bank of India, cited supra, the Apex Court has categorically held that the proviso to Section 33 (2) (b) of the Industrial Disputes Act affords protection to a workman to safeguard his interest and it is in the nature of a shield against victimization and unfair labour practice by the employer during the pendency of an industrial dispute.
16. It is seen that the Labour Court, after analysing the entire evidence and the material documents, has set aside the order of dismissal, passed on the second respondent. Thereafter, the learned single Judge, placing reliance on a Constitution Bench decision of the Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma and Others, 2002 (2) Supreme Court Cases 244, and a decision of this Court in Ramanujam v. P.O., Industrial Tribunal, Chennai and Another, 2003 (4) L.L.N.117 and also an unreported decision dated 01.10.2004 passed in W.P.No.15585 of 2004 in K.Ramakrishnan and Others v. The Presiding Officer and Another, rejected the plea of the management, holding that the second respondent had already raised the plea of contravention of Section 33 (2) (b) before the Tribunal at the stage of complaint.

17. That being so, the order of the Tribunal, as affirmed by the learned single Judge, in our standpoint, does not suffer from any infirmity. Therefore, we have no hesitation to confirm the concurrent findings rendered by the learned single Judge and also the Tribunal. The decisions cited on behalf of the appellant are not of any avail to the appellant, as they stand on a different footing.

18. In view of our above discussions and following the ratio laid down by the Supreme Court and also this Court in a catena of decisions cited above, we are of the considered opinion that this Writ Appeal is devoid of merit. Accordingly, we dismiss this Writ Appeal. No costs. Consequently, the connected M.P.No.1 of 2007 is also dismissed.

Index : Yes (S.J.M.,J.) (V.D.P.,J.)
Internet : Yes 14-08-2008

dixit

To

The Presiding Officer,
Industrial Tribunal,
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S.J.MUKHOPADHAYA,J. AND

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W.A.No.943 OF 2007

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